

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **201302021**

Release Date: 1/11/2013

CC:ITA:B05:ECSchwartz
POSTN-149249-12

Third Party Communication: None
Date of Communication: Not Applicable

UILC: 139D.00-00

date: December 05, 2012

to: Christie J. Jacobs
Director, Indian Tribal Governments
Tax-Exempt and Governmental Entities
([Office Name])
Attn: Blu Pannhoff

from: William A. Jackson
Branch Chief, Branch 5
(Income Tax & Accounting)

subject: Definition of Medical Care Under §139D, POSTN-149249-12

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

This is in response to your request for technical assistance concerning the proper interpretation and application of the exclusion from gross income for certain payments or reimbursements for qualified Indian health care benefits under § 139D of the Internal Revenue Code. Specifically, you have asked if payments from an Indian tribe to a tribal member for the purchase of non-prescription drugs are excludable payments under §139D. Your request indicates that your office has received numerous inquiries on this issue.

Section 139D(a) provides that except as otherwise provided in this section, gross income does not include the value of any qualified Indian health care benefit.

Section 139D(b)(2) provides that for purposes of §139D, the term “qualified Indian health care benefit” includes medical care provided or purchased by, or amounts to reimburse for such medical care provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of such a member.

Section 139D(c)(3) provides that for purposes of §139D, the term “medical care” has the same meaning as when used in § 213.

Section 213(a) allows as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, spouse, or a dependent (as defined in § 152, determined without regard to §§ 152 (b)(1), (b)(2), and (d)(1)(B)), to the extent that the expenses exceed 7.5 percent of adjusted gross income.¹

Section 213(b) provides that an amount paid during the taxable year for a medicine or drug is taken into account under § 213(a) only if the medicine or drug is a prescribed drug or is insulin. Under § 213(d)(3), the term “prescribed drug” means a drug or biological that requires a prescription of a physician for its use by an individual.

Section 213(d)(1) provides in part that for purposes of § 213 the term “medical care” means amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

Section 139D provides for an exclusion from gross income for the receipt of certain payments or reimbursements made by an Indian tribal government to or on behalf of its tribal members relating to the delivery of health care. Defining the extent of this exclusion and whether it includes payments or reimbursements for non-prescription drugs ultimately requires an analysis of the term “medical care” as used in § 139D.

Section 139D(c)(3) specifically states that “medical care” has the “same meaning as when used in § 213.” The statute expressly uses the terminology “as when used in § 213” and not “as defined in § 213(d).” The difference in interpretation is significant. If “medical care” is interpreted solely by reference to the definition in § 213(d), and without reference to the rest of § 213, then the definition in that provision arguably is broad enough to encompass non-prescription drugs as “medical care” because non-prescription drugs can be used for the mitigation, treatment or prevention of disease or for purposes of affecting a structure or function of the body. If, however, for purposes of § 139D(c)(3), “medical care” is interpreted by reference to § 213 read in its entirety, then the prescribed drug rule in § 213(b) limits the definition of “medical care” for § 139D(c)(3). Non-prescription drugs would not qualify as “medical care” for purposes of § 139D(c)(3) under this interpretation.

Your memorandum concludes that, because § 139D(c)(3) uses on its face the “as when used” language, § 213 should be read in its entirety when applying it to § 139D with the result that payments or reimbursements for non-prescription drugs do not qualify for the exclusion from gross income under § 139D. We agree.

¹ The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat 119 (2010), amended § 213(a) to increase the 7.5 percent of adjusted gross income requirement to 10 percent of adjusted gross income, for most taxpayers effective for taxable years beginning after December 31, 2012.

The § 139D language “as when used in § 213” contrasts with the cross-reference to § 213 in § 105(b) to “medical care (as defined in section 213(d)).” Rev. Rul. 2003-102, 2003-2 C.B. 559, interprets the § 105(b) language to encompass drugs or medicines used for medical care without regard to the prescription limitation. Thus, the revenue ruling holds that reimbursements by an employer of amounts paid by an employee for medicines and drugs available without a doctor’s prescription are excludible from gross income.

Rev. Rul. 2003-102 was obsoleted by § 106(f), added by § 9003(c) of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat 119 (2010) (ACA). Section 106(f) provides that, for purposes of §§ 105 and 106, reimbursements for expenses for a medicine or a drug are excludable from income only if the medicine or drug is prescribed (whether or not available over the counter) or insulin. Section 106(f) is effective for the taxable years beginning after December 31, 2010.

Section 139D also was added to the Code by the ACA (§ 9021). We infer that Congress was aware of the contrasting language in §§ 105(b) and 106(f) and drafted the “as when used” language in § 139D(c)(3) with the specific intent that all of § 213 applies for purposes of defining “medical care” in § 139D(c)(3).

A statutory interpretation of the term “medical care” in § 139D(c)(3) that incorporates all of the rules and limitations that apply to the deduction under § 213, and therefore limits the § 139D exclusion for payments or reimbursements for medicine or drugs to prescription drugs and insulin, is consistent with the intent of Congress. We therefore conclude that payments or reimbursements made by an Indian tribe to its members for non-prescription drugs or medicines are not excludible from gross income as qualified Indian health care benefits under § 139D.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4960 if you have any further questions.